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IN THE

Supreme Court of the United States

DR. CHARLES THOMAS SELL, D.D.S.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF *AMICI CURIAE* THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC. AND EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

The Association of American Physicians & Surgeons, Inc. ("AAPS") is a non-profit organization dedicated to defending the practice of private medicine. Founded in 1943, AAPS publishes a newsletter, journal and other materials in furtherance of its goals of limited government and the free

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

market. Members of AAPS object to the violation of ethical medicine entailed in the forced drugging of a peaceful prisoner with antipsychotic medication. It is a fundamental principle of medical ethics, and human rights generally, that individuals have the right to decline treatment when they pose no threat to others or themselves. AAPS has a strong interest in protesting the misuse of medicine in violation of this basic principle.

Eagle Forum Education and Legal Defense Fund ("EFELDF") is a nonprofit organization founded in 1981. For over twenty years it has defended principles of limited government and individual liberty which, at a minimum, preclude the federal government from forcibly medicating peaceful individuals against their will. EFELDF is increasingly concerned about public officials compelling citizens to submit to treatment, such as requiring Ritalin or controversial vaccines as a condition of admission to school. EFELDF has a strong interest in restraining government from seizing the power to inject its adversaries with mind-altering drugs.

Amici have a direct and vital interest in the issues presented to this Court based on their representation of physicians and other individuals.

SUMMARY OF ARGUMENT

The decision below created a new federal police power to forcibly drug peaceful citizens presumed to be innocent. This unprecedented power, devoid of any constitutional or statutory basis, is frightening in its potential consequences. It is abjectly inhumane for Petitioner Dr. Sell. Never found guilty of any crime and posing no threat to others, Dr. Sell must submit to forced injection of mind-altering drugs unlimited in quantity and type. *United States v. Sell*, 282 F.3d 560, 565, 571 (8th Cir. 2002). His mental and physical fate is placed entirely in the hands of a single government psychiatrist operating without meaningful oversight.

The Eighth Circuit held that merely by alleging fraud and proffering testimony by a government doctor, a federal prosecutor may alter the mind of a prisoner against his will. The stunning breadth of the decision leaves few, if any, defendants free from the threat of being forcibly subjected to antipsychotic drugs. The decision below set no limits on the type or quantity of the drugs to be injected, allowing even drugs that have not been fully tested and approved for the given purpose. *See* Point II.A, *infra*. This ruling is contrary to every norm of this Court, and Anglo-American jurisprudence.

In so holding, the Eighth Circuit expressly admitted its conflict with the heightened standard of review for drugging adopted by the Sixth Circuit. "[U]nlike the Sixth Circuit, we do not adopt the strict scrutiny standard," the court below held. 282 F.3d at 568. The Eighth Circuit also implicitly rejected heightened standards required by other Circuits and by the logic of this Court.

Manipulation of a peaceful citizen's mind against his will is not an enumerated federal power. The Eighth Circuit has effectively thrust its citizens into a federal experiment unacceptable to the other Circuits. This is not an experiment within the meaning of Justice Brandeis' famous declaration that "a single courageous State may, if its citizens choose, serve as a laboratory." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). No citizens approved this mandatory drugging, and here the federal government rather than a State is doing the experimenting. Mere accusation of regulatory violations, the governmental interest in medicating Dr. Sell to try him, cannot justify alteration of his mind against his will.

Unfortunately, advances in medical technology inevitably facilitate this attempt to expand federal power. Over 50 years ago, George Orwell predicted the misuse of mind-control technology in his famous novel *1984*. There the "persecutor" O'Brien confronts the prisoner with the tool of a hypodermic

syringe, and severe cruelty results. It is uncivilized to authorize a prison doctor to administer, in his sole discretion, any quantity and type of antipsychotic medication over the objections of a peaceful prisoner.

ARGUMENT

The Eighth Circuit adopted a standard for forced medication that expressly conflicts with the Sixth Circuit, and also runs afoul of the D.C. Circuit and Supreme Court. 282 F.3d 560. The court below held that by merely alleging fraud and submitting testimony from a government psychiatrist and psychologist, the federal government may subject a prisoner to unlimited mind-altering drugs over his objection. 282 F.3d at 571 (noting that the government psychiatrist "Dr. Wolfson did not name a specific medication," though he suggested likely possibilities). The court implicitly allowed drugs that have not been fully tested and approved for the specific purpose. Because the decision below is at odds with other Circuits and teachings of this Court, the petition for certiorari should be granted.

By fiat, the Eighth Circuit has granted the federal government an extraordinary means to punish without satisfying the burden of proof. Never before has an American court authorized a prison doctor to administer, in his sole discretion, any quantity and type of antipsychotic medication over the objections of a peaceful pretrial prisoner. 282 F.3d at 565 ("[W]e agree that the evidence does not support a finding that Sell posed a danger to himself or others at the Medical Center."). Government must not have the power to drug defendants simply by claiming it beneficial to do so, which Justice Brandeis expressly warned against: "experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

The seizure of this new federal power errs in fact as well as law. Petitioner Dr. Sell has already spent nearly five (5) years in prison (including nearly twenty months in solitary confinement) while the government has litigated this issue. This incarceration is more than a year *longer* than his severest sentence under the Sentencing Guidelines for the underlying fraud charges. The dissenting opinion below recognized the limit of 41 months on Dr. Sell's maximum sentence if convicted on the relevant charges, but the panel majority apparently failed to realize that he has already served far more than that period. 282 F.3d at 573 (Bye, J., dissenting). Government's interest in subjecting Dr. Sell to a trial can be no greater than its interest in sentencing him, which at this point is nil.

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH OTHER CIRCUITS AND THIS COURT CONCERNING THE STANDARD OF REVIEW.

The dissent below described the conflict with other Circuits. The basis for requiring antipsychotic drugs for Dr. Sell here is quite similar to the facts found insufficient by the Sixth Circuit:

> The Sixth Circuit stated 'we find it difficult to imagine . . . that the government's interest in prosecuting the charge of sending a threatening letter through the mail could be considered a compelling justification to forcibly medicate Brandon." [*United States v. Brandon*, 158 F.3d 947, 961 (6th Cir. 1998)]; *cf. Bee v. Greaves*, 744 F.2d 1387, 1395 (10th Cir. 1984) (questioning whether the state's interest in trying suspects could ever outweigh a criminal defendant's interest in avoiding forcible medication with antipsychotic drugs).

282 F.3d at 573 (Bye, J., dissenting).

The *Brandon* court expressly adopted a strict scrutiny standard that the panel majority below rejected. "We believe that the risk of error and possible harm involved in deciding whether to forcibly medicate an incompetent, non-dangerous pretrial detainee are . . . so substantial as to require the government to prove its case by clear and convincing evidence." *Brandon*, 158 F.3d at 961. The *Brandon* holding adhered to at least two Supreme Court lines of precedents, both implicitly rejected by the Eighth Circuit.

First, the "clear and convincing" standard is required by this Court in order to involuntarily commit a citizen:

> The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state. We conclude that the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.

Addington v. Texas, 441 U.S. 418, 427 (1979). This high standard has frequently been affirmed by this Court in related contexts. *See, e.g., Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 282 (1989). In requiring this heightened level of scrutiny for state medical decisions, this Court foreclosed the relaxed standard applied by the Eighth Circuit here.

Second, this Court has applied the "clear and convincing" standard to state court determinations in family law, and it is inconsistent and unacceptable for federal courts to allow a lower standard. In *Santosky v. Kramer*, this Court reversed a decision of the New York family court because it separated children from their natural parents without satisfying the "clear and convincing" standard of proof. 455 U.S. 745, 747-48 (1980). "Before a State may sever completely and irrevocably the rights of parents in their natural child, due

process requires that the State support its allegations by at least clear and convincing evidence." *Id.* This Court held that "[f]ew forms of state action are both so severe and so irreversible"—the same reason the Sixth Circuit required heightened scrutiny of orders to alter citizens' minds. *Id.* at 759; *Brandon*, 158 F.3d at 961. *See also M. L. B. v. S. L. J.*, 519 U.S. 102, 118 (1996) (embracing the "clear and convincing" standard when a party's interest is "'commanding,'" and Dr. Sell plainly has a commanding interest here) (quoting *Santosky*, 455 U.S. at 758-59).

Federal Courts of Appeal have duly implemented the heightened standard for "commanding" personal interests akin to Petitioner Dr. Sell's with respect to his own mental state. In addition to the above-referenced Sixth Circuit decision in *Brandon*, the D.C. Circuit implicitly adopted the "clear and convincing" standard. "The district court held the government to a clear-and-convincing-evidence burden of proof. Neither party challenges this determination." *United States v. Weston*, 255 F.3d 873, 880 n.5 (D.C. Cir. 2001) (citing 134 F. Supp. 2d at 121 & n.12). The *Weston* court restated this in terms of what is "necessary" and "essential": "Accordingly, to medicate Weston, the government must prove that restoring his competence to stand trial is necessary to accomplish an essential state policy." 255 F.3d at 880. Defendant Weston, it is worth noting, was apprehended at the scene of the murder of two United States Capitol Police officers and the serious wounding of a third, and charged with those heinous crimes, in sharp contrast to the non-violent allegations here against Petitioner Dr. Sell.

Other Circuits have likewise imposed heightened burdens of proof as a prerequisite to mind-altering medication. In a widely followed ruling, the Tenth Circuit adhered to a standard of strict scrutiny in requiring that "less restrictive alternatives, such as segregation or the use of less controversial drugs like tranquilizers or sedatives, should be ruled out before resorting to antipsychotic drugs." *Bee v.*

Greaves, 744 F.2d 1387, 1396 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985). That Court ruled against prison officials because there was no evidence of an emergency to justify the forced treatment. "In view of the severe effects of antipsychotic drugs, forcible medication *cannot be viewed as a reasonable response to a safety or security threat if there exist 'less drastic means for achieving the same basic purpose.'*" *Id.* (emphasis added). The *Greaves* court even questioned whether a State's interest in trying a defendant could *ever* justify mandatory medication of him, a philosophical issue that this Court need not resolve here. *See id.* at 1395 ("[A]lthough the state undoubtedly has an interest in bringing to trial those accused of a crime, we question whether this interest could ever be deemed sufficiently compelling to outweigh a criminal defendant's interest in not being forcibly medicated with antipsychotic drugs."). *See also Kulas v. Valdez*, 159 F.3d 453, 455 (9th Cir. 1998) ("To force antipsychotic drugs on a prisoner or on a detainee awaiting trial **is impermissible** under the federal constitution, 'absent a finding of **overriding justification** and a determination of medical appropriateness.'") (quoting *Riggins v. Nevada*, 504 U.S. 127, 135 (1992)) (emphasis added).

The decision below contradicts these precedents. It flatly rejects *Brandon*, fails to mention *Greaves* or *Kulas*, and completely omits any reference to this Court's seminal *Addington* and related opinions. Instead, it focused on two precedents of this Court that do not entirely resolve the issue at hand, though they too point towards reversal of the Eighth Circuit here. *See Riggins v. Nevada*, *supra*; *Washington v. Harper*, 494 U.S. 210 (1990). The *Harper* decision emphasized that there is "no doubt that . . . [an inmate] possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." *Id.* at 221-22. Its facts, however, entailed a post-conviction defendant, which

Dr. Sell is not. Hence that "significant liberty interest" recognized in *Harper* is far greater for Dr. Sell here.

Subsequently, the *Riggins* decision held that:

> 'The forcible injection of medication into a nonconsenting person's body . . . represents a substantial interference with that person's liberty.' In the case of antipsychotic drugs . . . that interference is particularly severe . . . .

Riggins, 504 U.S. at 134 (quoting *Harper*, 494 U.S. at 229). A court may override this liberty interest based only on "a finding that safety considerations or other **compelling** concerns outweighed [defendant's] interest in freedom from unwanted antipsychotic drugs." *Riggins*, 504 U.S. at 136 (emphasis added). As in *Harper*, the facts in *Riggins* did not require this Court to confront forced pretrial drugging. But Justices Thomas and Scalia observed that "[t]he standards for forcibly medicating inmates well may differ from those for persons awaiting trial." *Riggins*, 504 U.S. at 157 (Thomas and Scalia, JJ., dissenting). No one on this Court expressed disagreement.

The decision below erred in assuming that there is no difference in standard for forced medication of pretrial defendants compared to post-conviction defendants. The Eighth Circuit thereby allows the federal government to alter defendants' minds based merely on (1) unproven charges of non-violent crimes and (2) disputed testimony by government-hired witnesses. This contradicts the "compelling concerns" of this Court with respect to a peaceful defendant presumed by law to be innocent of the charges. *Riggins*, 504 U.S. at 136. Moreover, the decision below allows government to infringe on a defendant's right to decline government-mandated treatment in favor of treatment recommended by his own physician. *Sell*, 282 F.3d at 569-70.

The panel majority below did not once address the term "compelling" in its opinion. Instead, it relied heavily on a

district court opinion in California addressing similar facts. *Id.* at 568 ("[T]he Southern District of California refused to adopt a strict scrutiny standard."). But that court did insist on the heightened level of scrutiny of "clear and convincing evidence," in reliance on *Brandon*. *United States v. Sanchez-Hurtado*, 90 F. Supp. 2d 1049, 1055 (S.D. Cal. 1999) (quoting *Brandon*, 158 F.3d at 961).

In dictum, *Riggins* did allow that "'the state might have been able to justify medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of Riggins' guilt or innocence by using less intrusive means.'" 282 F.3d at 566 (quoting *Riggins*, 504 U.S. at 135). But that comment was based only on the compelling need to punish defendant Riggins, who was condemned to death for "stabbing [another] 32 times with a knife . . . [and then taking] cash, drugs, and other items from [the victim's] home." 504 U.S. at 146 (Thomas, J., dissenting). That dictum is hardly controlling for Petitioner Dr. Sell, whom the Eighth Circuit ordered to be drugged based on a regulatory dispute over billings under the Medicaid program. Nor is Dr. Sell remotely comparable to the defendant in *Weston*, for whom "the government's interest . . . reaches its zenith when the crime is the murder of federal police officers in a place crowded with bystanders where a branch of government conducts its business." 255 F.3d at 881.

II. REVIEW IS NECESSARY TO ADDRESS THE PARAMOUNT ISSUE OF WHETHER THE FEDERAL GOVERNMENT HAS THE POWER TO FORCIBLY INJECT NON-VIOLENT, PRE-TRIAL DETAINEES WITH MIND-ALTERING DRUGS.

Federal police power cannot extend to drugging non-violent citizens, presumed to be innocent, on facts like Petitioner's. There is no basis for such authority in the enumerated federal powers, nor does it advance any legiti-

mate federal interest here. Its potential for abuse is unlimited, and the Petition presents an issue of paramount importance warranting review.

The core of the Bill of Rights—the Fourth through Eighth Amendments—protect citizens against an overzealous federal government. The Federalists, advocating passage of the Constitution without a bill of rights, declared them to be unnecessary because they guard against powers the federal government did not have. "For why declare that things shall not be done which there is no power to do?" The Federalist No. 84, p. 481 (Kesler and Rossiter ed. 1999). The Federalists surely would have scoffed at any suggestion that the federal government could require the injection of mind-altering drugs into peaceful, innocent citizens. Hence the Bill of Rights did not prohibit this inconceivable power. *Cf. Federal Maritime Comm'n v. S.C. State Ports Auth.*, 122 S. Ct. 1864, 1871 n.8 (2002) (noting the inappropriateness of a strict textual approach with respect to conduct "that itself lacks any textual basis in the Constitution").

A. Federal Enumerated Powers Do Not Include Forced Antipsychotic Medication.

Playing doctor falls outside federal jurisdiction. States regulate medical issues, like mental health, just as they have exclusive jurisdiction over family law and most education. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). That does not prevent the federal government from detaining Dr. Sell until he is competent or has served the maximum punishment for his alleged crime. But the federal government cannot go beyond those remedies and force medical treatment on its presumed-innocent adversaries, any more than it can dictate family law decisions about them. Federal police power does not extend beyond its constitutional authority. *See*

Lopez, 529 U.S. at 564 (rejecting "a general police power," and citing the dissenting Justices' agreement with that principle).

The decision below further transgresses limited government by allowing the prison psychiatrist to inject any quantity or type of drugs into Dr. Sell, without oversight or accountability. In *Riggins*, this Court reversed the medication of the defendant, observing that "Riggins received a very high dose of the drug." 504 U.S. at 133; *see also id.* at 143 (Kennedy, J., concurring) (noting expert testimony that "'the dose he had been taking [] is very, very high [and] I mean you can tranquilize an elephant with'" such dose). The Court there held that defense counsel had not objected to the dose in a timely manner, implying that such an objection would have been proper. 504 U.S. at 133 (holding that "at no point did [defense counsel] suggest to the Nevada courts that administration of Mellaril was medically improper treatment for his client"). Yet the decision below deprives Dr. Sell of his right to object to the dosage or the type of drug to be administered, instead giving the prison psychiatrist *carte blanche* to inject him with whatever he chooses. 282 F.3d at 571 ("[W]e reject Sell's contention that he was not given the opportunity to make specific objections to specific drugs.").

This Court has emphatically rejected attempts by States, let alone the federal government, to engage in anything approaching mind control. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940)). The *Barnette* Court emphasized the "individual freedom of mind" as the strength of our country, "in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end." 319 U.S. at 637. Forced medication may promote uniformity, but the *Barnette* Court cautioned against "the uniformity of the graveyard." *Id.* at 641. Later, this Court extended that principle to protect

against compelled speech in *Wooley v. Maynard*, 430 U.S. 705 (1977). This doctrine carries even greater weight for injecting mind-altering drugs in defendants presumed to be innocent.

Allowing possibly untested treatments for Dr. Sell without his consent is particularly troubling. The failure of American courts to enforce the Nuremberg Code, which expressly prohibits the use of untested drugs without informed consent, has been tragic. The highest court of Maryland recently deplored this unfortunate chapter of American jurisprudence: "'[O]ur own use of prisoners, the institutionalized retarded, and the mentally ill to test malaria treatments during World War II was generally hailed as positive, making the war 'everyone's war.' Likewise, in the late 1940's and early 1950's, the testing of new polio vaccines on institutionalized mentally retarded children was considered appropriate. Utilitarianism was the ethic of the day.'" *Grimes v. Kennedy Krieger Inst., Inc.*, 366 Md. 29, 77, 782 A.2d 807, 836 (2001) (quoting Dr. George J. Annas, *Mengel's Birthmark: The Nuremberg Code in United States Courts*, 7 J. Contemp. Health L. & Pol'y 17, 24 (Spring 1991)). *See also In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 822 (S.D. Oh. 1995) (decrying that "the United States, aided by officials of the City of Cincinnati, treated at least eighty-seven (87) of its citizens as though they were laboratory animals").

The Supreme Court of Montana also recently rejected this utilitarian approach to forced medical treatment. *See In re Mental Health of K.G.F.*, 306 Mont. 1, 29 P.3d 485 (2001). It held that counsel would be presumed to be ineffective if he acquiesces in involuntary commitment for a mental disorder. That court rejected the utilitarian ethos:

> Nevertheless, our concept of due process regarding state action involuntarily imposed on individuals with mental disorders has surely progressed since the U.S. Supreme Court's decision in *Buck v. Bell*. In that case, Justice

> Holmes described a 'feeble-minded white woman,' who was the daughter of a 'feeble-minded mother' and the mother of an 'illegitimate feeble-minded child.' The Court declared that the woman, who was committed to the 'State Colony for Epileptics and Feeble Minded,' could be involuntarily sterilized in the 'best interest of the patients and of society' because: 'It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . . Three generations of imbeciles are enough.'

306 Mont. at 13-14, 29 P.3d at 496 (quoting *Buck v. Bell*, 274 U.S. 200, 205-07 (1927)). *See also In re W.*, 637 P.2d 366, 368-69 (Colo. 1981) (agreeing with scholars who "have concluded that compulsory sterilization laws, no matter what their rationale, are unconstitutional in the absence of evidence that compulsory sterilization is the only remedy available to further a compelling governmental interest") (citing, *inter alia*, Burgdorf & Burgdorf, *The Wicked Witch Is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 Temp. L.Q. 995 (1977)).

Demonstrating the high potential for abuse of power, historians later discovered that neither the subject of the *Buck v. Bell* mandatory sterilization, Carrie Buck, nor her daughter, was mentally defective by today's standards. The daughter, in fact, was reportedly "very bright" and was listed on her school's honor roll. Albert W. Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* 65 (Univ. Chicago: 2000) (quoting Robert J. Cynkar, Buck v. Bell: *"Felt Necessities" v. Fundamental Values?*, 81 Colum. L. Rev. 1418, 1458 (1981)). There, as here, the factual claims were based on testimony by a government witness. And despite assurances of protections against abusive sterilizations, Carrie Buck's sister was even sterilized without her knowledge, under the ruse that she was having an appendectomy. Alschuler, *supra*, at 66 (citing Sheldon M. Novick, *Honorable Justice: The Life of Oliver Wendell Holmes* 478 n. 65 (Little, Brown: 1989)). Professor Alschuler observed that the *Buck v. Bell* decision imposing treatment without patient consent "merits its reputation for brutality." *Id.*

The same inhumane utilitarianism underlies the decision below. The testimony by Dr. Wolfson suggests eagerness to use novel drugs on Dr. Sell, without his consent:

> Q: Now, let me ask you this, what medications would you propose for Dr. Sell if you were to treat him?
> A: . . . There is another [drug] that they are hoping to have in a few months, that on paper looks very promising as well called Ziprazodone, Z-I-P-R-A-Z-O-D-O-N-E. As usual, there's experiment in Europe well before [its] introduction here. So that can be considered [too], if [it] shows up in time . . . .

Medication Hearing Transcript, September 29, 1999, at 90 (App. 7a).

The testimony that a new drug would be used on prisoner Sell "if [it] shows up in time" is disconcerting. *Id.* The court below required neither general FDA approval for the drugs to be used by Dr. Wolfson, nor authorization for their specific use. Drugs approved for one use by the FDA can be legally prescribed for unapproved and untested, "off-label" use. *See, e.g., "Off-Label" and Investigational Use of Marketed Drugs, Biologics, and Medical Devices*, FDA Guidance for Institutional Review Boards and Clinical Investigators (1998).[2] But such "off-label" use is based on patient consent, which is lacking here. The decision below authorizes the prison medical staff to drug Dr. Sell with "off-label", experimental uses, without the patient's consent.

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[2] Available online *at http://www.fda.gov/oc/ohrt/irbs/offlabel.html* (viewed 10/4/02).

B. Dr. Sell Has Already Served More Than a Year Longer than His Maximum Possible Punishment, and the Ordered Medication Does Not Advance Any Legitimate Governmental Interest.

Dr. Sell has already served nearly five (5) years in jail, twenty (20) months of which has been in solitary confinement, while the government has sought the power to medicate him. There is no legitimate governmental interest in punishing him further. His servitude has far exceeded his maximum sentence for the charges supposedly justifying his forced medication, and the incarceration continues. The dissent below noted that Dr. Sell's maximum imprisonment if convicted, under a very generous view of the government's relevant charges, is less than 3½ years. *Sell*, 282 F.3d at 573 (Bye, J., dissenting) ("his sentencing range would be 33-41 months"). The governmental interest in drugging Dr. Sell for trial can be no greater than its interest in punishing him further, which is non-existent.

In *Riggins*, the State's interest in medicating the defendant was to try him for the very purpose of inflicting additional punishment: the death penalty. 504 U.S. at 131. Nevertheless, this Court reversed an order requiring antipsychotic drugs, even though the State possessed this compelling interest in further punishing him. *See id.* at 134-38. Here, the federal government itself attempts to inject similar drugs into a defendant for whom it can impose no further punishment, and certainly not the death penalty. Its purported rationale for drugging Dr. Sell—to try him for a crime entailing no further imprisonment—is not a legitimate predicate.

The court below implied that Dr. Sell is somehow so despicable that he deserves this fate. It recounted an unfortunate incident in which Dr. Sell purportedly spat in the face of a magistrate, and implied that the incident occurred in court. 282 F.3d at 563. It did not. Nor was Dr. Sell ever

charged, much less convicted, for that allegation. As Dr. Sell explained on an investigatory wiretap, the incident was the result of his being struck on the head and repeatedly provoked while being led, handcuffed, to a holding cell. In a highly agitated state, and contrary to ordinary procedure, Dr. Sell was there confronted by an inexperienced magistrate, without the presence of his attorney as he was desperately requesting. It is highly prejudicial to Dr. Sell for the court below to cite this incident as evidence, as it did not occur in a courtroom and did not result in charges.[3]

Moreover, medication should never serve as a form of punishment, no matter how offensive the crime. "Forced administration of antipsychotic medication may not be used as a form of punishment. This conclusion follows inexorably from our holding in *Vitek v. Jones*, 445 U.S. 480 (1980), that the Constitution provides a convicted felon the protection of due process against an involuntary transfer from the prison population to a mental hospital for psychiatric treatment." *Harper*, 494 U.S. at 242 (Stevens, Brennan, Marshall, JJ., concurring and dissenting in part). Nor should the medical profession be misused as a tool for punishment.

The medical testimony in favor of injecting Dr. Sell here is woefully inadequate. It is based on only two witnesses, a government psychologist and psychiatrist, both of whom had limited experience and inadequate success rates. While the decision below stated that "the government must prove by clear and convincing evidence that the medication is medically appropriate," the evidence is anything but. 282 F.3d at 567. The federal government made no effort to obtain

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[3] There were also accusations of intemperate remarks by Dr. Sell after being arrested by FBI agents. That incident, too, was recounted by the court below but does not justify the order for forced drugging. 282 F.3d at 563. There is no factual record about what incited the outburst, and it is not relevant to the Petition anyway.

the testimony of independent, qualified psychiatrists to justify its attempt to drug Dr. Sell. Dr. DeMier, the government psychologist who even lacked authority to prescribe medication, said he had experience with a grand total of only two patients similar to Dr. Sell—and the medication failed for one of them. *Id.* at 569. [4] Dr. Wolfson's experience was not much better, amounting to a total of only four patients, one of which was unsuccessful. *Id.*

The Eighth Circuit deferred to the district court under the clearly erroneous standard. But this evidence falls far short of the requisite "clear and convincing" standard. *Id.* at 567. It is convincingly clear that the injection of mind-altering drugs into Dr. Sell will alter his mind. Depending on dose and reaction, it may cause confusion, torpor, permanent disfiguring and disabling movement disorders, permanent brain damage and even death. Even the government expert conceded the substantial probability of "'significant side effects.'" *Id.* at 569 (quoting Dr. DeMier's testimony). But there is insufficient evidence, let alone "clear and convincing" evidence, that the drugging will render Dr. Sell competent for trial.

In the classic novel *1984*, George Orwell's hero is an Englishman named Winston Smith who faces a government attempt to extirpate his mental independence and spiritual dignity:

> O'Brien was standing at his side, looking down at him intently. At the other side of him stood a man in a white coat, holding a hypodermic syringe. . . . Did I not tell you just now that we are different from the persecutors

[4] The court below erred in finding the government provided testimony by two psychiatrists; in fact, one of those witnesses (Dr. DeMier) is a psychologist lacking authorization even to prescribe medicine. *Compare* 282 F.3d at 563 *with* Medication Hearing Transcript, September 29, 1999, at 20 (App. 4a).

> of the past? We are not content with negative obedience, nor even with the most abject submission. When finally you surrender to us, it must be of your own free will. We do not destroy the heretic because he resists us; so long as he resists us we never destroy him. We convert him, we capture his inner mind, we reshape him. We burn all evil and all illusion out of him; we bring him over to our side, not in appearance, but genuinely, heart and soul. We make him one of ourselves before we kill him. It is intolerable to us that an erroneous thought should exist anywhere in the world, however secret and powerless it may be.

George Orwell, *1984* at 243, 258 (Harcourt, Brace & World: 1949).

Dr. Sell likewise refuses to conform his mind to government preferences. Its response is an unrelenting effort to alter his mind through drugs. Not even imprisonment for nearly five years has satiated this desire to drug Dr. Sell. Its purported justification is to dispel Dr. Sell's allegedly delusional views of government. But this court-ordered drugging is self-defeating with respect to that stated purpose.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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October 7, 2002

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 4.97CR290 (DJS)
4:98CR177 (DJS)

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHARLES SELL,
Defendant,

TRANSCRIPT OF THE EVIDENTIARY HEARING

RE: INVOLUNTARILY PSYCHIATRIC TREATMENT AND MEDICATION BEFORE THE HONORABLE TERRY I. ADELMAN UNITED STATES MAGISTRATE JUDGE

TRANSCRIPT ORDERED BY: Lee T. Lawless

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Recorded By: Karen Moore,
Court Reporter

Transcribed By: Carter Transcription &
Reporting Company

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[4] MR. LAWLESS: Yes, that they,—I'd probably would like a copy of their,—

MR. MARCUS: Mr. Short has a copy,—

MR. LAWLESS: Get me one too, to put into the record.

MR MARCUS: Okay.

MR. LAWLESS: But, we are not going to contest it,—testify his expert witnesses.

MR. MARCUS: Your Honor, at this time I would call Dr. Richart DeMier.

MR. LAWLESS: I'd like to invoke the rule to exclude witnesses.

THE COURT: Okay.

RICHART DEMIER, GOVERNMENT'S SWORN

MR. MARCUS: May I proceed?

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR MARCUS:

Q All right, Mr. DeMier I'm going to hand you what has been marked Government's Exhibit 2 which is a,—we would ask you to identify this for us please?

A Yes. That's my Curriculum Vitae, which describes my education and clinical experience.

MR. MARCUS: I would like to offer Government's Exhibit 2 in evidence at this time.

[5] THE COURT: Any objection?

MR. SHORT: No.

THE COURT: May be so admitted. Thank you.

BY MR. MARCUS:

Q All right, Dr. DeMier, what is your occupation?

A I'm a Clinical Psychologist.

Q And, by whom are you employed?

A I'm employed by the U.S. Medical Center for Federal Prisoner's

Q And how long have you been there?

A I've worked at that institution four or five years.

Q Okay. Dr. DeMier in your capacity, at the Medical Center in Springfield, have you had an opportunity to have contact with Dr. Sell?

A Yes, I have.

Q And what would be your role as to Dr. Sell in the institution?

A I evaluated Dr. Sell when he was admitted for an evaluation of competency, that evaluation occurred between February 24th and March 25th of this year. I have also worked with him since his return to our institution on April 20th of this year, when he was committed for competency restoration treatment.

Q And when he was committed initially and now you have been his attending clinical?

* * * *

[20] in the treatment and care of two patients diagnosed with delusional disorder frequency.

Q In delusional disorder, is somewhat of a rare diagnoses?

A Yes, it is fairly infrequent.

Q And it would have been a new diagnosis since 1987?

A That's correct.

Q And, in the two that you have seen,—now as a psychologist, you cannot prescribe medicine, but you were involved in the treatment and you saw how the medicine was prescribed and worked?

A That's correct.

Q What was the treatment that was used in these two gentlemen?

A In both cases the patients were prescribed anti-psychotic medications.

Q And do you recall which medications in these two cases?

A One patient was prescribed Haldol, the other was prescribed Olanzapine.

Q And these are both anti-psychotics?

A Yes, they are.

Q And in the two cases were you able to restore to competency either of the two?

A Yes.

* * * *

[73] obviously I'm,—

MR. LAWLESS: I didn't feel that way like that.

THE COURT:—you had something to do, you do it, okay.

MR. LAWLESS: Thank you.

THE COURT: Mr. Marcus.

MR. MARCUS: I have no redirect.

THE COURT: Dr. DeMier, thank you very much. You may be excused.

WITNESS: You're welcome, your Honor.

THE COURT: You may call your next witness. I'll take that back, why don't we take about three,—five minute recess.

(Temporary Recess From. 10:50 p.m. Until 11:05 p.m.)

THE COURT: Mr. Marcus, you may proceed.

MR. MARCUS: Your Honor, at this time the Government would call Dr. James K. Wolfson.

JAMES K. WOLFSON,
GOVERNMENT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. MARCUS:

Q Sir, for the record can you state your name please?

A Yes. James K. Wolfson, M.D.

Q And Mr. Wolfson, where do you currently work?

A I'm at the U.S. Medical Center for Federal [74] Prisoners in Springfield, Missouri.

Q And what is your current position there?

A I'm a staff psychiatrist, I'm the only psychiatrist who is on the forensic service along with other psychologists colleges.

Q All right. Dr. Wolfson, I'm going to hand what has been marked Government's Exhibit 3, and ask you to identify this for us please?

A This is my Curriculum Vitae.

MR. MARCUS: Your Honor, at this time I'd offer Government's Exhibit 3 into evidence.

MR. SHORT: I have no objection.

THE COURT: It be so admitted. Thank you Mr. Marcus.

Q All right. Dr. Wolfson, as staff psychologist at the Medical Center in Springfield, had you been involved in the treatment of Dr. Sell?

A Yes, I have.

Q And, would it be fair to characterize your role in his treatment as a consultant?

A Yes, it would be.

Q And, one of the issues you are involved in consulting, would be the potential use of medication for him?

A Yes. That is how I'm connected to everyone of the

* * * *

[90] Q Now, let me ask you this, what medications would you propose for Dr. Sell if you were to treat him?

A I prefer not to get pinned down to a single drug, because part of this I hope to actually leave in his hands, to pick among available alternatives, so he can at least have some role in the decision making process. Of the atypical agents, there are two; Quetiapine, should I spell that for the transcription,—Q-U-E-T-I-A-P-I-N-E,—

MR. SHORT: I'm sorry, can you spell that again please?

THE WITNESS: Quetiapine. Q-U-E-T-I-A-P-I-N-E, sold as the brand name Seroquel, S-E-R-O-Q-U-E-L. And, another medication, Olanzapine, O-L-A-N-Z-A-P-I-N-E, which is sold as Zyprexa, Z-Y-P-R-E-X-A, and those are the,—I think the two of the three, for atypical agents, those are the two that make the most sense. There is another one that they are hoping to have in a few months, that on paper looks very promising as well called Ziprazodone, Z-I-P-R-A-Z-O-D-O-N-E. As usual, there's experiment in Europe well before it's introduction here. So that can be considered to, if shows up in time, but those are the ones that make the most sense, be most likely to have a benign side effect so profile.

* * * *